IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.10.2007

CORAM:

THE HON'BLE MR. JUSTICE K.MOHAN RAM

A.S.No.943 of 1993

1.Poongavanam Ammal
2.Chinnapillai Ammal
3.Bagyammal
4.Kandan .. Appellants

-Vs-

1.Karuppayi Ammal
2.Karuppayi Ammal
3.Desi Ammal
4.Valliammal
5.Chandra .. Respondents

Appeal against the judgment and decree dated 15.06.1993 made in O.S.No.34 of 1987 on the file of the Sub-Court, Vriddhachalam.

For Appellants : Mr.V.Raghavachari

For Respondent 1 : Mr.V.Ayyadurai

For Respondents 2 to 5: No appearance

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J U D G M E N T

The unsuccessful defendants 1 to 4 in O.S.No.34 of 1987 on the file of the Sub-Court, Vriddhachalam are the appellants in the above appeal.

2. For the sake of convenience the parties are referred to as per their ranking in the suit.

3. The case of the plaintiff is as follows:

The plaint 'C' schedule properties belonged to one Muthukaruppa Servai; Muthukaruppa Servai's only son was Subburaya Servai and Subburaya Servai's only son was Ayyakannu Servai; Ayyakannu Servai's wife was Angammal; Ayyakannu Servai and Angammal had two sons namely Murugan and Duraisamy and two daughters namely the defendants 1 and 2; the plaintiff is the wife of Duraisamy; the third defendant is the daughter of the first defendant; Muthukaruppa Servai, Subburaya Servai and Ayyakannu Servai died intestate prior to 1937; Murugan died unmarried and intestate in the year 1954; Duraisamy husband of

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the plaintiff also died intestate in the year 1952; Since the plaint 'C' schedule properties are the ancestral properties of Ayyakannu Servai, after his death the same devolved upon his sons Murugan and Duraisamy and both of them were entitled to ½ share each; On the death of Duraisamy his wife as sole heir succeeded to his ½ share as per Hindu Law; since Murugan died intestate and issueless in 1954 his mother Angammal succeeded to his ½ share as per Hindu Law; thus the plaintiff and Angammal became entitled to ½ share in the plaint 'C' schedule properties.

4. It is the further case of the plaintiff that on the death of Duraisamy, the plaintiff and Angammal were in joint possession and enjoyment of the 'C' schedule properties; in 1959 due to difference of opinion both of them as per the advice of the panchayatdars divided the properties and as per the decision of the panchayatdars 'A' schedule properties were allotted to the plaintiff and 'B' schedule properties were allotted to Angammal; from then on both of them were enjoying the said properties by paying kist separately; the plaintiff was paying kist for the properties allotted to her and she continued to be in possession; after the said arrangement in 1959 the plaintiff and Angammal are entitled to their respective shares. Angammal has no independent right over the 'C' schedule properties and even if she claims any such right it is untenable; Angammal died in 1982; after her death her daughter namely the defendants 1 & 2 are entitled to her ½ share; thus the plaintiff is entitled to ½ share and defendants 1 & 2 together are entitled to ½ share in the 'C' schedule properties. While so, in July 1985, since the defendants 1 & 2 attempted to alienate Item No.3 of the 'A' schedule property which was allotted to the plaintiff, the plaintiff caused a legal notice dated 05.07.1985 to the defendants 1 to 3. On receipt of the legal notice, the defendants 1 to 3 sent a reply notice dated 23.07.1985 contending the averments as false. In the said reply notice the defendants 1 to 3 contended that items 4,5 & 6 of 'A' schedule properties and items 4 to 7 of 'B' schedule properties belonged absolutely to Periyasamy Servai husband of the 1st defendant. The rest of the properties are the separate properties of Angammal. Neither Ayyakannu Servai nor Muthukaruppa Servai had any right in the properties. Angammal executed a settlement deed on 02.05.1960 in favour of the defendants 1,4 and the 2nd defendant. Angammal and defendants 1 & 2 have jointly executed a settlement deed dated 18.08.1979 in favour of the third defendant. The settlement deeds mentioned in the reply notice have not come into force and were not acted upon and the settlees under the settlement deeds were not in possession of the properties. Since the suit properties are ancestral properties of Ayyakannu Servai and as the plaintiff is entitled to ½ share in it and Angammal has no right to execute the settlement deed in respect of the plaintiff share and as such the settlement deeds in so far as the share of the plaintiff is concerned are void and not binding on the plaintiff.

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5. Pursuant to the oral partition in 1959, the plaintiff and Angammal were enjoying the 'A' and 'B' schedule properties respectively, while so, Angammal alienated the 3rd item of 'B' schedule property in favour of the defendants 5 to 7. Since Angammal was dealing with the properties allotted under oral partition, the plaintiff did not object the same. To get a binding adjudication, the alienees have also been impleaded as parties. Since the plaintiff and defendants 1 & 2 are co-sharers they are in joint possession of the suit properties in consonance with the oral partition in 1959. The plaintiff has sought for a declaration of title in respect of 'A' schedule properties. Since the defendants 1 to 4 have trespassed into 'A' schedule properties after filing of the suit, recovery of possession was also prayed for and mesne profit was also claimed. Since the 8th defendant has purchased the 1st item of the 'A' schedule properties on 13.02.1987 she has also been impleaded as a party.

6. It is further pleaded in the plaint that in case if the Court comes to a conclusion that oral partition made in 1959 is not proved, the plaintiff is praying for an alternative relief of partition and separate possession of her ½ share in the 'C' schedule properties and for mesne profit.

7. The defendants 1 to 4 contested the suit, the written statement filed by the 4th defendant has been adopted by the defendants 1 to 3. They contested the suit inter alia contending as follows:

The allegations in paragraphs 3 to 10 are false; Muthukaruppa Servai has no property at all; Ayyakannu Servai was mentally retarded; the date of death of parties as given in the plaint are denied; the plaint 'C' schedule properties did not belong to Ayyakannu Servai; the oral partition of 1959 claimed by the plaintiff is not true; plaintiff was never been in possession of any properties; the properties described as item Nos. 4 to 6 in 'A' schedule and item Nos.4 to 7 in 'B' schedule properties belonged to Periyasami Servai father of the defendants 1 & 2 as the same was acquired by him under assignment from the Government. Items 1,2,3,7 and 8 of 'A' schedule and items 1,2,3,8 and 9 in 'B' schedule properties belonged absolutely to Angammal wife of Ayyakannu Servai, as such the plaintiff cannot claim any right in the properties; as absolute owners Periyasami Servai and Angammal were in possession and enjoyment of the properties on their own right. The settlement deed executed by Angammal have been properly accepted by the settlees and they have come into force and the settlees continue to be in open and peaceful possession of the properties; the defendants 1,2 and 4 in their own right are in possession and enjoyment for over the statutory period and their title has been perfected by adverse possession. The gift deed dated 18.08.1979 executed by Angammal in respect of items 1 and a portion of item 3 in favour of the 3rd defendant is legally valid; the 3rd defendant also perfected the title by adverse possession.

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8. The suit is in the nature of champerty, the plaintiff has purportedly executed in favour of her counsel in respect of item 1 of 'A' schedule property knowing fully well that she had no right over the property and as an agreement for the conduct of the suit on behalf of the plaintiff. Hence the suit is liable to be dismissed in limine; the suit properties have not been properly valued; the plaintiff is not in joint possession of the properties, therefore valuation adopted under Section 37(2) is untenable; inspite of the assertion of title, the plaintiff has not chosen to mention how Muthukaruppa Servai was entitled to the suit properties; the claim of the plaintiff is vexatious and on the above said pleadings the defendants 1 to 4 sought for the dismissal of the suit.

9. The 6th defendant filed a separate written statement inter alia contending as follows:

The allegations in paragraphs 3 to 10 are false; even assuming the oral partition pleaded by the plaintiff to be true, since on the death of Angammal, the defendants 1 and 2 are entitled to the 'B' schedule property; the registered sale deed dated 26.04.1971 executed by them in favour of the defendants 6 & 7 in respect of an extent of 2.64 acres out of 3.95 acres in R.S.No.216/1 is valid; ever since the date of purchase, defendants 6 & 7 are in possession and enjoyment of the same; apart from possession and title, defendants 6 & 7 prescribed title by adverse possession also.

10. In the additional written statement filed by the 4th defendant it is contended as follows:

The relationship mentioned in para 4 of the plaint is not correct; the year of death of the predecessors-in-title as shown in the plaint is not correct; the allegation that the defendants 1 to 4 trespassed into 'A' schedule property after filing of the suit is not correct; the plaintiff never enjoyed 'A' schedule properties and in particular she was not in possession of the properties from 1959 as claimed by her; the suit is barred by limitation; the plaintiff has executed the sale deed dated 19.11.1985 in favour of the 8th defendant in respect of item 1 of 'A' schedule property on the same date when the suit was filed; thereafter intentionally has got the plaint returned and re-presented the same only after a delay of two years and with an intention to cause hardship and loss to the defendants.

11. The plaintiff filed a reply statement contending as follows:

The allegation contained in the written statement of the defendants are false; having admitted the relationship of the parties in the reply notice sent by them, the defendants have denied the relationship in their written statement; after the summons in the suit was served, the 4th defendant using his manpower harvested the crops raised by the plaintiff in her properties and from then on the defendants 1 to 4 are in possession of the 'A' schedule properties and therefore they are liable for mesne profit till they deliver possession of the properties; since the 4th defendant is an

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influential person, by using his influence he has obtained patta under U.D.R. Scheme in respect of the 'A' schedule properties; he has prevented the Village Administrative Officer from collecting kist from the plaintiff; the plaintiff paid kist in respect of her share of land till 1985; though the defendants 1 to 4 have stated in their written statement that the suit properties belonged to Angammal, they have not stated as to how they are entitled to the same; since the defendants 1 to 4 have claimed properties belonging to Angammal they are not entitled to claim title by adverse possession; in respect of item 1 of 'A' schedule property the plaintiff has executed a sale deed in favour of the 8th defendant after receiving the sale consideration of Rs.6,600/-; the defendants 1 to 4 are not entitled to question the said sale; the suit was filed on 19.11.1985 but the sale deed was executed only on 14.02.1987 and as such the allegations of the defendants to the contrary are not correct.

12. The 8th defendant has contested the suit by filing a separate written statement inter alia contending as follows:

The 8th defendant has purchased an extent of 0.33 cents in Survey No.84/5 which is shown as item No.1 in 'A' schedule under a sale deed dated 13.02.1987 for valid consideration of Rs.6,600/-. Since the plaintiff was in possession and enjoyment of the property, the 8th defendant has purchased the property from her; but as per the recitals in the sale deed, the 8th defendant could not take possession since the defendants 1 to 4 prevented her from taking possession and the defendants 1 to 4 are in possession of the property and therefore they are liable to pay mesne profit to her; the property purchased by the 8th defendant should be allotted to the share of the plaintiff.

13. On the above said pleadings the following issues have been farmed by the trial court:-

(i) Whether the plaintiff is entitled for declaration as prayed for?

(ii) To what relief the plaintiff is entitled to?

The following additional issues have also been framed:

(a) Whether the defendants 1 to 3 are liable to pay mesne profit?

(b) Whether the 8th defendant is entitled to get any relief on equity?

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14. During trial, on the side of the plaintiff her brother Periyasamy Servai was examined as P.W.1 and Exs.A-1 to A-15 have been marked. On the side of the defendants, the fourth defendant was examined as D.W.1 and three other witnesses have been examined as D.Ws.2 to 4 and Exs.B-1 to B-46 have been marked. The trial court on a consideration of the oral and documentary evidence adduced in the case, held that items 2 to 8 of the plaint 'C' schedule properties

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belonged to Periyasamy Servai as the same had been assigned to him by the Government and as such the plaintiff is not entitled to seek partition in respect of the suit properties. The trial court further held that the plaintiff is entitled to seek partition of her ½ share in respect of items 1, 9 to 13 and 14 in the plaint 'C' schedule properties and granted a preliminary decree, but rejected the relief of mesne profit claimed by the plaintiff as well as the 8th defendant. The trial court further held that since the 8th defendant is not a bonafide purchaser, he is not entitled to get any equitable remedy. Being aggrieved by the judgment and decree of the trial court, the defendants 1 to 4 have filed the above appeal.

15. In the memorandum of grounds of appeal, the judgment and decree of the trial court is challenged as under:-

The judgment and decree of the trial court is contrary to law, erroneous and opposed to the probabilities of the case; The court below erred in decreeing the suit for partition on the basis of Ex.A1 which is termed as a holding register when the contents of the document have neither been proved by any other independent evidence or by production of title deeds; Ex.A1 does not have any statutory value as it is not a register which is to be maintained under the Indian Registration Act; the court below should not have based reliance on Ex.A1 and should have dismissed the suit for partition holding that the properties are the properties of Angammal; the litigation is in the nature of champerty should have been dismissed as the wife of the plaintiff's counsel had purchased the items of suit properties and is financing the litigation; even in Ex.A1 reference was made to Angammal in respect of certain properties and as such those properties should have been excluded.

16. Heard Mr.V.Raghavachari, learned counsel appearing for the appellants and Mr.V.Ayyadurai, learned counsel appearing for the 1st respondent.

17. The main contention of Mr.V.Raghavachari, learned counsel appearing for the appellants is that Ex.A1 does not have any statutory value in as much as it is not a register which is to be maintained under Section 51 of the Indian Registration Act and unless it is a document which is liable to be maintained by a statutory authority in the course of discharge of his statutory functions, the lower court ought not to have placed reliance on the same.

18. The learned counsel appearing for the appellants further contended that since the plaintiff had executed the sale deed in favour of the wife of his counsel in respect of item 1 of the 'A' schedule property, the litigation is champertons in nature and the suit should have been dismissed in limine.

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19. The learned counsel appearing for the appellants wanted to make submissions assailing the findings of the trial court negating the claim for adverse possession put forth by the defendants 1 to 4 but as no grounds have been raised in the memorandum of grounds of appeal questioning such finding of the trial court, this Court is of the view that the appellants are not entitled to advance any arguments on such findings.

20. Countering the said submissions, the learned counsel appearing for the 1st respondent submitted that Ex.A1 has been summoned and produced from the office of the Sub-Registrar and the same is maintained under the Indian Registration Act and a perusal of Ex.A1 will shows that it contains entries relating to various transactions and the name of Ayyakannu Servai in patta No.221. The learned counsel further submitted that Ex.A1 has not been questioned by the defendants 1 to 4 while the same was marked as Exhibit in the trial court and as rightly pointed out by the trial court the contents of Ex.A1 has not been disputed while cross examining P.W.1. The learned counsel further submitted that only based on the entries contained in the registers similar to Ex.A1, encumbrance certificates are being issued by the office of the Sub Registrars. The learned counsel further submitted that the trial court has accepted the case of the plaintiff that the suit properties are the ancestral properties of Ayyakannu Servai not only on the basis of Ex.A1 but also on the corroboration provided by Ex.A15 in which Ayyakannu Servai has mentioned a portion of land comprised in S.No.51/8. The learned counsel further drew the attention of this Court to the suggestion put to P.W.1 in the course of his cross examination by the defendants 1 to 4 suggesting that items 1, 2, 3, 7 & 8 of 'A' schedule properties belonged to Periyasamy Servai, father of the 4th defendant by virtue of TKT patta issued in his favour and items 4 to 6 of plaint 'A' schedule properties and items 4 to 7 of 'B' schedule properties also belonged to Periyasamy Servai and as such the plaintiff is not entitled to claim any right over the same. Similarly items 1,2,3,7 & 8 of the plaint 'A' schedule properties and items 1,2,3,8 & 9 of plaint 'B' schedule properties are the separate properties of Ayyakannu Servai and the plaintiff has no right to seek a share.

21. The learned counsel appearing for the respondent further submitted that since the defendants 1 to 4 though have suggested to P.W.1 that items 1,2,3,7 & 8 of 'A' schedule property and items 1,2,3,8 & 9 of 'B' schedule properties are separate properties of Ayyakannu Servai and they are not entitled to claim that the suit properties are the separate properties of Angammal wife of Ayyakannu Servai. It has been further suggested to P.W1 in his cross examination that Angammal was paying kist in her name and in the name of her husband for patta No.221.

22. I have carefully considered the above submissions made by the learned counsel on either side, the materials available on record and perused the judgment of the Court below.

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23. The contention of the learned counsel for the appellants that Ex.A-1, which is termed as a holding register does not have any statutory value inasmuch as it is not a register which is to be maintained under Section 51 of the Indian Registration Act, in the considered view of this court, is untenable. Documents which are compulsory registrable are enumerated in Section 17 of the Registration Act, 1908 (hereinafter referred to as "the Act"), where a document is employed to effectuate in all the transactions specified in Section 17 of the Act, such document must be registered notwithstanding that the transaction is one which the law does not require to be put into writing. Part XI of the Act deals with the duties and powers of Registering Officers and the Register-books to be kept in the several offices. Section 51 of the Act reads as follows:-

> "51. Register-books to be kept in the several offices. - (1) The following books shall be kept in the several offices hereinafter named, namely:-
>
> A – In all registration offices –
>
> Book 1, "Register of non-testamentary documents relating to immovable property";
>
> Book 2, "Record of reasons for refusal to register";
>
> Book 3, "Register of wills and authorities to adopt"; and
>
> Book 4, "Miscellaneous Register";
>
> B – In the office of Registrars –
>
> Book 5, "Register of deposits of wills".
>
> (2) In Book 1 shall be entered or filed all documents or memoranda registered under sections 17, 18 and 89 which relate to immovable property, and are not wills.
>
> (3) In Book 4 shall be entered all documents registered under clauses (d) and (f) of section 18 which do not relate to immovable property.
>
> (4) Nothing in this section shall be deemed to require more than one set of books where the office of the Registrar has been amalgamated with the office of a Sub-Registrar."

A reading of the above provisions shows that all registration offices should maintain Book 1, which is a register of non-testamentary documents relating to immovable property. A reading of Section 51 (2) of the Act shows that details of all documents registered under Section 17 of the Act and which relate to immovable property shall be entered in book 1. Sections 54, 55 (1) and (2) and 57 (1) and (5) of the Act read as follows:-

> "54. Current indexes and entries therein.- In every office in which any of the books hereinbefore mentioned arekept, there shall be prepared current indexes of the contents of such books; and every entry in such indexes shall be made, so far as practicable, immediately after the registering officer

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has copied, or filed a memorandum of, the document to which it relates.

55. Indexes to be made by registering officers, and their contents.- (1) Four such indexes shall be made in all registration – offices, and shall be named, respectively, Index No.I, Index No.II, Index No.III, and Index No.IV.

(2) Index No.I shall contain the names and additions of all persons executing and of all persons claiming under every document entered or memorandum filed in Book No.1.

57. Registering Officers to allow inspection of certain books and indexes and to give certified copies of entries.- (1) Subject to the previous payment of the fees payable in that behalf, the Books Nos.1 and 2 and the Indexes relating to Book No.1 shall be at all times open to inspection by any person applying to inspect the same; and, subject to the provisions of section 62, copies of entries in such books shall be given to all persons applying for such copies.

(2) ....

(3) ....

(4) ....

(5) All copies given under this section shall be signed and sealed by the registering officer, and shall be admissible for the purpose of proving the contents of the original documents".

A combined reading of the above said provisions of the Act shows that when book 1 is kept in every office indexes of the contents of such book shall be prepared and every entry in such indexes shall be made, so far as practicable, immediately after the registering officer has copied, or filed a memorandum of, the document to which it relates. Index No.I shall contain the names and additions of all persons executing and of all persons claiming under every document entered or memorandum filed in Book No.1. On payment of prescribed fee any person applying to inspect book Nos.1 and 2 and indexes relating to book no.1, are entitled to inspect the same and subject to the provisions of Section 62 of the Act copies of entries in such books shall be given to all persons applying for such copies. As per Section 57 (5) of the Act, all copies given under Section 57 of the Act shall be signed and sealed by the registering officer and shall be admissible for the purpose of proving the contents of the original documents. If Ex.A-1 is considered in the light of the above said provisions it could be seen that it comes within the purview of Section 55 (2) of the Act since Ex.A-1 contains all the details as contemplated in Section 55(2) of the Act. Therefore, the contention of the learned counsel for the appellants that Ex.A-1 is not a document to be maintained under any provision of the Registration Act is untenable. Whereas the contention of the learned counsel for the first respondent that Ex.A-1 contains all the details relating to

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encumbrances made in respect of the properties which stood in the name of Subburaya Servai and Ayyakannu Servai is acceptable. A perusal of Ex.A-1 shows that the following properties comprised in S.F.Nos.51/8, 316/1, 219/6, 78/12, 84/5 and 84/7 were comprised in patta No.221 and stood in the name of Subburaya Servai and Ayyakannu Servai. The properties in S.F.No.216/1 had been dealt with by Ayyakannu Servai by document dated 13.06.1984. Similarly, the lands comprised in Survey Nos.51/8, 72/12, 84/5 and 84/7 have been dealt with by Angammal, Murugan and Duraisamy Servai under a document executed on 26.04.1942 and registered on 11.05.1942. In respect of an extent of 66 cents in Survey No.51/8 Ayyakannu Servai has executed a mortgage deed on 14.07.1933 in favour of Nallathambi Pathar and Kesabudayar and Ex.A-15 is the certified copy of the said mortgage deed. In respect of land comprised in Survey No.216/1, Angammal, Murugan and Duraisamy have executed a mortgage deed in favour of one Virudambal. All the above said entries in Ex.A-1 makes it abundantly clear that the properties dealt with by Angammal and her sons were originally comprised in patta No.221 belonging to Subburaya Servai and Ayyakannu Servai. If the properties really belong to Angammal, as her separate property, they would not have been shown as comprised in patta No.221 as admittedly patta No.221 stood in the name of Subburaya Servai and Ayyakannu Servai. Further, if the properties were the separate properties of Angammal there was no need for joining Murugaservai, Duraisamy, the son of Angammal, Angammal and Ayyakannu Servai in the execution of various documents. The irresistable inference that could be drawn from the above said entries in Ex.A-1 is that the properties dealt with thereunder are the ancestral properties of Ayyakannu Servai. Ex.A-15 also shows that Ayyakannu Servai had dealt with the properties comprised in Survey No.51/8.

24. A perusal of the evidence of P.W.1 shows that during the cross examination of P.W.1 with reference to the entries in Ex.A-1, P.W.1 has not been cross examined and the correctness of the entries in Ex.A-1 have also not been disputed. It has not been explained by any acceptable evidence by defendants 1 to 4 as to why Murugan Servai and Duraiswamy Servai had joined with Angammal in the execution of the above said documents if really the suit properties belonged to Angammal as her separate properties as claimed by defendants 1 to 4. It has also been suggested to P.W.1 that in respect of patta No.221, Angammal had paid Kists in her and in her husband's name. If really, as claimed by defendants 1 to 4, the suit properties are the separate properties of Angammal, it is un-understandable as to how patta no.221 came to be issued in the name of Iyyakannu Servai alone. Whereas it is clear that after the death of Iyyakannu servai, Angammal was paying Kists in respect of patta no.221. It is pertinent to point out that it has been suggested to P.W.1 during his cross-examination that item Nos.1, 2, 3, 7 and 8 of plaint 'A' schedule and items 1, 2, 3, 8 and 9 of plaint 'B' schedule are the separate properties of Iyyakannu Servai. This particular suggestion

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has been put to P.W.1 after making suggestion relating to the properties belonging to Periyaswamy, the father of the fourth defendant. The learned counsel for the first respondent relying upon the above said suggestion made to P.W.1 submitted that defendants 1 to 4 themselves have admitted that the above said items are the separate properties of Iyyakannu Servai and defendants 1 to 4 have no case to argue. But countering the above said submission the learned counsel for the appellants submitted that the said suggestion has been made only by the counsel who appeared for defendants 1 to 4 in the trial court and such suggestion it would not bind defendants 1 to 4. In support of the above said contention, the learned counsel for the appellants relied upon a decision of the Apex Court in the case of Swami Krishnanand Govindanand Vs. M.D.Oswal Hosery (Regd.) and reported in (2002) 3 Supreme Court Cases 39, wherein in paragraph 3 the Apex Court has observed as follows:-

> "3. Mr Jaspal Singh, learned Senior Counsel appearing for the appellant, has vehemently contended that statement made by the learned counsel of the respondent across the Bar is indeed an admission of the party and, therefore, the Additional Rent Controller recorded his satisfaction on the basis of the admission; the order of the Additional Rent Controller cannot thereby be treated as being without jurisdiction. We are afraid we cannot accede to the contention of the learned counsel. Whether the appellant is an institution within the meaning of Section 22 of the Act and whether it required bona fide the premises for furtherance of its activities, are questions touching the jurisdiction of the Additional Rent Controller. He can record his satisfaction only when he holds on these questions in favour of the appellant. For so holding there must be material on record to support his satisfaction otherwise the satisfaction not based on any material or based on irrelevant material, would be vitiated and any order passed on such a satisfaction will be without jurisdiction. There can be no doubt that admission of a party is a relevant material. But can the statement made by the learned counsel of a party across the Bar be treated as admission of the party? Having regard to the requirements of Section 18 of the Evidence Act, on the facts of this case, in our view, the aforementioned statement of the counsel of the respondent cannot be accepted as an admission so as to bind the respondent. Excluding that statement from consideration, there was thus no material before the Additional Rent Controller to record his satisfaction within the meaning of clause (d) of Section 22 of the Act. It follows that the order of eviction was without jurisdiction."

A careful consideration of the above said observation of the Apex

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Court shows that a statement made by the learned counsel of a party across the bar cannot be termed as an admission of the party. But in the case on hand what is sought to be relied upon by the learned counsel for the first respondent is not a statement made by the learned counsel for defendants 1 to 4 across the bar, but a suggestion put to P.W.1 in the course of his cross-examination. It is presumed that all questions put to a witness by a learned counsel are put as per the instructions of the parties for whom the counsel is appearing and as such the above suggestion put to P.W.1 cannot be explained away as a statement made by the learned counsel across the bar. Hence the above said decision of the Apex Court is not applicable to the facts of this case.

25. The evidence of P.W.1, entries in Ex.A-1, Ex.A-15 and the above suggestion made to P.W.1, if taken as a whole clearly shows that the properties described in plaint 'C' schedule excluding the properties which have been assigned by the Government in favour of Periyaswamy Servai were the ancestral properties of Ayyakannu Servai.

26. It is worthwhile to consider the evidence of D.W.1. Though defendants 1 to 4 have claimed that the properties are separate properties of Angammal no documentary evidence has been adduced to prove the same. D.W.1 in his cross examination has stated that the properties belong to Angammal through her mother and the said information was furnished to him by his grandmother. D.W.1 has stated that he does not know as to whether the parents of Angammal possessed any properties. He has also stated that he does not remember the name of Angammal's father and mother and about that he has not asked his grandmother. He has denied the suggestion that the properties are the ancestral properties of Muthukaruppa Servai, Subburaya Servai and Ayyakannu servai. He has also stated that the parents of Angammal purchased the properties for her and the said information was furnished by his grandmother. He has also admitted that he had not made any search for the documents. Though D.W.1 has been questioned with reference to the entries in Ex.A-1, he had not stated anything disputing the correctness of the entries in Ex.A-1. As pointed out above, D.W.1 has also not been cross examined about the correctness of the entries contained in Ex.A-1.

27. For the above said reasons, this Court is of the considered view that the plaintiff has proved that the properties in respect of which the plaintiff is seeking for partition were the ancestral properties of Ayyakannu Servai and the said properties are not the separate properties of Angammal.

28. The trial court has considered the oral and documentary evidence in the proper perspective and has rightly held that the plaintiff has not proved the oral partition said to have taken place in 1959 between her and Angammal. The trial court has rightly pointed out that since the plaintiff and Angammal are co-sharers adverse possession cannot be claimed by defendants 1 to 4 as D.Ws.1 to 4 are claiming only through Angammal. The trial court has also

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rightly pointed out that defendants 1 to 4 have not pleaded ouster. Since the plea of ouster has not been raised in the pleadings, defendants 1 to 4/appellants herein have not chosen to question the correctness of the findings recorded by the trial court on the question of adverse possession.

29. After hearing was over and judgment was reserved the learned counsel for the appellants have circulated the written arguments calling it as additional written arguments after serving a copy of the same on the learned counsel for the first respondent. The learned counsel for the first respondent has also filed the written submissions.

30. I have carefully considered the submissions contained in the written arguments submitted by the learned counsel on either side. In respect of the submissions contained in the written arguments it has to be pointed out that no argument was advanced by the learned counsel for the appellants in the course of hearing. It has also to be pointed out that no such ground has been raised in the memorandum of grounds of appeal. Therefore the learned counsel for the first respondent has raised an objection that the said submission cannot be entertained.

31. In the written arguments, the learned counsel for the appellants has submitted that even assuming that the suit properties are the ancestral properties, if it is proved that the plaintiff is in possession after her husband's death, she is entitled to only 1/4th share in the suit properties. If the plaintiff was not in possession after the death of her husband, she is not entitled to any share. It is further contended that in the year 1952, the plaintiff's husband died and the plaintiff will not have any right over the share of the joint family properties except the right of maintenance and death of Duraisamy, the husband of the plaintiff, his half share would go to Murugan, the other son of Ayyakannu Servai and after the death of Duraisamy, Murugan had become the absolute owner of the entire share. In the year 1954, Murugan died and so his mother-Angammal would get limited right over the entire properties and the limited right of the mother would amount to an enlarged interest by Section 14(1) of the Hindu Succession Act. It is further submitted that P.W.1 himself has admitted that immediately after the death of the plaintiff's husband, she went to her brother's house and that would show that the plaintiff would not be entitled to any share over the suit properties.

32. The learned counsel for the first respondent in his written submissions, as stated above, has raised the objection that since no such ground has been raised in the memorandum of grounds of appeal, the above said contention of the learned counsel for the appellant could not be entertained. Without prejudice to the above said contention it is submitted by the learned counsel for the first respondent that the plaintiff is entitled to half share by Section 3 of the Hindu Women's Right to Property Act, 1937 in her capacity as a

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sole widow of her husband-Duraiswamy who died in the year 1952. Duraiswamy's mother is not entitled to any share under the provisions of the Hindu Women's Right to Property Act, 1937. Though specific pleading has been made in paragraph 5 of the plaint regarding the apportionment of share the same has not been specifically denied or dealt with in the written statement or in the additional written statement. It is further submitted that the contention of the learned counsel for the appellant that the plaintiff is entitled only to an extent of ¼-th share in the suit properties even if the suit properties are held to be ancestral is not based on any legally recognised principles of Hindu Law, but is opposed to express provisions contained in the Hindu Women's Right to Property Act, 1937. It is further contended that the contention of the learned counsel for the appellant that the plaintiff would get only right to maintenance is wholly unsustainable in law besides being misleading in the light of Section 3 of the Hindu Women's Right to Property Act, 1937.

33. I have carefully considered the above said submissions contained in the written arguments. The preliminary objection of the learned counsel for the first respondent has to be dealt with first as to whether the contention put forth by the learned counsel for the appellants can be entertained or not.

34. It is settled law that if the facts proved and found as established are sufficient to raise a new plea under Order 41 Rule 2 of the Code of Civil Procedure it is not only competent to but expedient in the interest of justice to entertain that plea. But when the question is not a pure question of law but a question of fact, the Court should not allow such question to be raised for the first time. Similarly, the appellate court ought not to allow a party to rely upon a point which was not raised in the Court of first instance and which requires an investigation into facts. It is also settled position of law that a Court of appeal is not entitled to allow an appellant to raise a new case, which is dependent for its determination on facts which have not been investigated and to which the parties have not directed their evidence. A point not explicitly taken in the memorandum of appeal to raise but raised at the time of argument cannot be entertained. It is also settled proposition of law that an appellate court is quite competent to base its decision upon a point arising out of the pleadings of the parties, if there is evidence on record as regards the same, although it is neither expressly taken before the Court. Therefore, it has to be considered whether the above said contention put forth by the learned counsel for the appellants is a pure question of law or a question of fact. Though the above said contention has neither been raised before the trial court nor raised in the memorandum of grounds of appeal nor argued during the course of hearing, this Court is of the considered view that the said contention is a pure question of law which can be decided on the basis of the findings recorded by the trial court. Further, for considering the said contention, no further

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investigation into the facts is necessary.

35. The above said contention of the learned counsel for the appellants as rightly contended by the learned counsel for the first respondent is against the provisions contained in Section 3(2) of the Hindu Women's Right to Property Act, 1937. The trial court has recorded a finding that the properties in respect of which the plaintiff is seeking partition have been found to be the ancestral properties of Ayyakannu Servai and as such on the death of her husband Duraisamy, the plaintiff being his widow takes his interest in the family property. The interest of the widow, namely the plaintiff, viz-a-vis her husband's undivided interest arises not by inheritance nor by survivorship but by statutory substitution as laid down in A.I.R. 1967 Supreme Court 232 (Satrughan Vs. Sabujitpari). As per Section 3(3) of the Hindu Women's Right to Property Act, 1937 any interest devolving on a Hindu Widow under the provisions of Section 3 shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition to a male owner. It is pertinent to point out that the trial court on a consideration of Exs.A-2 to A-12 has found that the plaintiff was in joint possession of the properties with defendants 1 to 4. Therefore at the coming into force of the Hindu Succession Act, 1956 and as provided under Section 14(1) of the said Act, the limited estate of the plaintiff would have got enlarged into her absolute property.

36. It is also pertinent to point out that the said finding of the trial court that the plaintiff was in joint possession of the properties with defendants 1 to 4 has not been questioned in the memorandum of grounds of appeal. For the said reasons, the contention of the learned counsel for the appellants are liable to be rejected and accordingly rejected. As rightly pointed out by the learned counsel for the first respondent the submission made by the learned counsel for the appellants in the written arguments is not only opposed to the provisions contained in the Hindu Women's Right to Property Act, 1937, but it is also misleading, since under the Hindu Women's Right to Property Act, 1937, the mother of the Hindu male who died intestate is not entitled to get any right in the property left behind by her deceased son.

37. For the above said reasons, the above appeal fails and the same is dismissed with costs of Rs.10,000/- (Ten thousand only).

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Sub Asst.Registrar

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To

The Sub-Court, Vriddhachalam.

1 cc To Mr.V.Raghachari, Advocate, SR.65263
1 cc To Mr.V.Ayyadurai, Advocate, SR.65244

A.S.No.943 of 1993

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